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SUPREME COURT, U.S.

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No. 81-5048

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

STEVEN ROY HARPER,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

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I.

OPINION BELOW

The opinion here questioned by the petitioner's direct appeal is State of Nebraska v. Steven Roy Harper, 208 Neb. 568, 304 N.W.2d 663 (1981).

II.

JURISDICTION

On April 17, 1981, the opinion here questioned was filed. The petitioner notes probable jurisdiction of this Court under 28 U.S.C. §1257 (3).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent accepts the petitioner's statement of the constitutional provisions involved. The respondent believes the following statutory provisions to be involved.

Neb.Rev.Stat. §28-401 (Reissue 1979)

Neb.Rev.Stat. §28-420 (Reissue 1979)

Neb.Rev.Stat. §§29-2519 - 29-2525 (Reissue 1979)

(Refer to Petitioner's Attachments)

IV.

QUESTIONS PRESENTED

The respondent accepts the petitioner's statement of the questions presented.

V.

STATEMENT OF THE CASE

On October 13, 1978, Harper was arrested in Beaumont, Texas, by the FBI. The Omaha Police Department was informed of Harper's arrest and on that same evening Officers Gregory Thompson and Kenneth Miller of the homicide division, along with Mr. Cooper of the Douglas County Attorney's Office arrived in Beaumont. Officer Thompson was the only one who spoke with Harper on that occasion.

After Harper's arrest, but prior to Officer Thompson's interview with him that night, Harper had apparently tried to commit suicide by cutting his wrists while in his cell. By the time Officer Thompson spoke to Harper, these wounds had been bandaged. Harper himself told Officer Thompson that he

felt fine, and that he did not want to go the the hospital (128:23-25).* Steven Harper was subsequently extradited to Douglas County, Nebraska, to stand trial. Harper was put on trial for two counts of murder in the first degree and three counts of poisoning with the intent to kill or maim.

On Monday, January 8, 1979, while Harper was awaiting trial, Officer Miller spoke with him (199:21-24). Officer Miller asked Harper if he would tell him the name of the substance he had used on the Johnson family. Harper said that he would, and indicated to the officer that he thought he had used Dimethyl Nitrosamine (DMN) (101:2-15). At a pretrial suppression hearing, the court ordered that the defendant's statements of October 13, 1978 (to Officer Thompson) and January 8, 1979 (to Officer Miller) could not be used by the prosecution in their case in chief (204:1-11). The court, at that time, reserved ruling on the use of these statements in rebuttal.

When the jury verdict was returned, the defendant, Steven Roy Harper, was found guilty on all counts.

On October 26, 1979, a hearing was held on the penalty issues. A presentence investigation, nineteen additional exhibits and additional testimony were considered by the district court before passing sentence. The district court then found beyond a reasonable doubt that Harper's crime presented four of the aggravating circumstances enumerated in Neb.Rev.Stat. §29-2523 (Reissue 1979). No mitigating factors were found to exist. Steven Roy Harper, the defendant, was then sentenced to death.

The petitioner also challenged the constitutionality of Nebraska's death penalty statutes in a motion to the trial court which was denied in its entirety. These issues were raised again by the petitioner in his brief and arguments to the Nebraska Supreme Court. The conviction and sentence were affirmed by the Nebraska Supreme Court in an opinion rendered April 17, 1981.

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*References with number refer to Bill of Exceptions of trial testimony.

VI.

ARGUMENT

A.

THE AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED IN A DEATH PENALTY CASE, AS DEFINED BY THE NEBRASKA SUPREME COURT, ARE CONSTITUTIONALLY ADEQUATE.

Steven Roy Harper claims that the mitigating and aggravating circumstances specified in Neb.Rev.Stat. §29-2523 (Reissue 1979) are vague and indefinite. The Nebraska Supreme Court has had several opportunities to review and discuss these statutory circumstances. That court has concluded the enumerated circumstances are not unconstitutionally vague. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977). Certiorari has never been granted in these cases. In each of these cases, the Nebraska Supreme Court discussed the statutory aggravating and mitigating circumstances found in §29-2523. That court clearly defined and explained the permissible boundaries of each and every one of these factors. We believe if the language of these cases is reasonably applied to the language of the statute, they become as precise as it is possible for words to be. We believe the wording and interpretation of all the aggravating and mitigating circumstances are sufficiently definite to meet constitutional requirements.

B.

THE MITIGATING CIRCUMSTANCES WHICH MAY BE CONSIDERED BY THE SENTENCING COURT ARE NOT LIMITED.

The Nebraska statutes here in question provide for the adequate consideration of any mitigating circumstance and thus comply with the rulings of this Court in Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978). While §29-2523 sets out specific aggravating and mitigating circumstances which are to be considered by the court prior to passing sentence, §29-2521 provides:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received.

(Emphasis added.) Lockett v. Ohio, supra, requires that the statutes in question not preclude a sentencing court from considering any aspect of a defendant's character as mitigating. The sections of the Nebraska statutes here in question do not, on their face or as interpreted by Nebraska's Supreme Court, preclude the consideration of such evidence. State v. Holtan, 205 Neb. 314, 318, 287 N.W.2d 671 (1980).

The evidence which the petitioner here sought to introduce as a mitigating circumstance was accepted and considered by the sentencing court. The sentencing court, however, evidently failed to find that the evidence offered "approach[ed] or exceeded the weight given to the aggravating circumstances." §29-2522.

C.

LB 711 IS PROPERLY AND CONSTITUTIONALLY APPLIED BY THE COURTS.

The interpretation of Neb.Rev.Stat. §29-2501.01, et seq. (Reissue 1979) [LB 711] by the Nebraska Supreme Court does not raise a question of constitutional magnitude, but, rather, one purely of interpretation of state legislation. The issue here presented by Harper was fully considered and resolved by the Nebraska Supreme Court in State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979). In that case, the court interpreted the statute to "require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973." Id. 205 Neb. 76, 287 N.W.2d at 29. That decision had the unanimous support of the Nebraska Supreme Court. Chief Justice Krivosha (who concurred in part and dissented in part) said, "I wholeheartedly concur in all the conclusions reached by the majority, including its analysis and interpretation of how we are to apply LB 711 [§29-2501.01, et.seq.]." Id. at 29, 287 N.W.2d at 31.

D.

SO LONG AS THE CRITERIA CONSIDERED ARE ADEQUATE, AND ADEQUATELY CONSIDERED AND APPLIED BY THE ENTITY PERFORMING THE PENALTY PHASE FUNCTION, THE COMPOSITION OF THAT ENTITY RAISES NO ISSUE OF CONSTITUTIONAL MAGNITUDE.

The petitioner questions the propriety of the statutory mechanism in this state which allows the determination of the penalty to be imposed upon a person found guilty of murder in the first degree to be made by the presiding judge or, upon the presiding judge's request, by a panel of the presiding judge and two additional judges designated by the Chief Justice of the Nebraska Supreme Court. Neb.Rev.Stat. §29-2520 (Reissue 1979). The petitioner claims this procedure violates his rights to due process and equal protection of the laws. However, he cites no authority for this proposition.

The procedures established by Nebraska statutes for determining whether the death penalty will be imposed have not been found to be constitutionally deficient in any respect. The statutes establish the criteria to be considered (§§29-2521 and 29-2523) and the balancing to occur between them (§29-2522). Section 29-2522 further provides:

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of facts based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

These requirements are applicable regardless of whether the presiding judge or a three-judge panel is determining the sentence.

It is important to note that the petitioner does not here challenge the standards under which the sentencing decision is made in this state. If the standards applied are not challenged and the application of those standards must comply with the provisions of §29-2522, regardless of the make-up of the sentencing forum, we fail to see any merit to the petitioner's assertions.

E.

VOLUNTARY STATEMENTS OF THE PETITIONER WERE PROPERLY AVAILABLE FOR REBUTTAL HAD THE PETITIONER TAKEN THE STAND.

The petitioner contends that a statement obtained without a Miranda warning is wholly inadmissible. To the contrary, this Court has definitively ruled that statements made without Miranda warnings may be used for some purposes. Harris v. New York, 401 U.S. 222 (1971); Oregon v. Haas, 420 U.S. 714 (1975). In Harris, the Court stated: "It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes." Id. at 224.

The Harris case is directly on point on this issue. In that case, the United States Supreme Court said that the prosecution could employ an inadmissible statement in rebuttal to attach the defendant's credibility if the defendant should happen to take the stand. Precisely the same ruling was made for precisely the same reasons by the trial court in the case at bar.

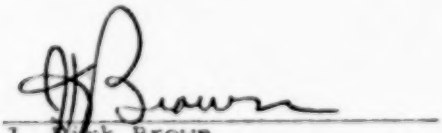
CONCLUSION

For the foregoing reasons, the respondent respectfully urges this Court to deny certiorari in this case.

Respectfully submitted,

THE STATE OF NEBRASKA,
Respondent,

By PAUL L. DOUGLAS
Attorney General

By 

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